In light of the foregoing, the recommended Guidelines fine for Boeing would be at the upper end of the range—i.e., towards $42,632,000,000, with a possible further upward departure for the hundreds of deaths Boeing caused. The parties concede that a prerequisite to imposing a sentence on Boeing in this case is a proper determination of the applicable guidelines. *See* Proposed Plea Agreement ¶ 23 (citing *United States v. Booker*, 543 U.S. 220 (2005)). Indeed, it would be error for the Court to proceed based on an incorrect Guidelines calculation. *See, e.g., United States v. Suchowolski*, 838 F.3d 530, 532 (5th Cir. 2016) ("the district court must still properly calculate the advisory Guidelines-sentencing range for use in deciding on the sentence to impose"). Because the proposed plea agreement lacks a properly calculated Guidelines-sentencing range, the Court should simply reject the agreement on that ground.

VI. The Court Should Reject the Plea Because the Compliance Monitor Provision Is Inadequate.

The parties' proposed plea also contains a provision for an "independent compliance monitor." Proposed Plea Agreement ¶ 25(f). It's about time for a monitor—but the Court should reject the parties' proposal as insufficient.[29]

The Court will recall that, a year and a half ago, the families first proposed that the Court should order the appointment of a monitor as a condition of Boeing's supervised release under the DPA. ECF No. 170 at 22-30. At the arraignment hearing, both the Government and Boeing argued against the families' proposed monitor. Essentially, the parties sold the Court a sanguine story that (at two years into a three-year process) everything was under control because the Department's

[29] Even the Department itself recognizes that "a court can … reject a plea agreement offered under Federal Rule of Criminal Procedure 11(c)(1)(C) if the judge concludes that the proposed terms of the monitorship do not adequately reflect the nature and seriousness of the offense, do not serve the purposes of a criminal sentence, or otherwise undermine faith in the fairness of the justice system." Lana N. Pettus, *Court-Appointed Corporate Monitors in Environmental Crimes Cases*, 69 DOJ J. FED. L. & PRAC. 101, 101 (2021).

monitoring was sufficient. The Government told the Court that that the Justice Department was "best positioned to implement the DPA and evaluate Boeing's compliance with these rigorous requirements. The Fraud Section has compliance experts who routinely evaluate compliance programs and oversee corporate monitorships and self-reporting." Hrng. Tr. (Jan. 26, 2023) at 96. And Boeing chimed in with a similar tale, recounting that "DOJ has been vigilant and thorough. They're professional and they probe, and they make suggestions, and as you would imagine, Boeing accepts those suggestions. And Boeing has been vigilant and thorough too. We sincerely believe the system is working and that any further monitor or examiner, reporting, would be duplicative to DOJ oversight and counterproductive to the processes that are operative now." *Id.* at 113-14.

Have representations to this Court ever proven to be so wide of the mark?!

The Court now knows that Boeing fell dismally—and dangerously— short of meeting its DPA obligations. The Department's "breach" determination in the agreement spans nine pages. Proposed Plea Agreement, Att. A. That determination recounts how (among other things) Boeing "failed to fully satisfy the [DPA] requirement to create and foster a culture of ethics and compliance with the law in its day-to-day operations, by failing to mitigate known manufacturing and quality risks." *Id.* at ¶ 6 (internal citation omitted). And public reports of serious concerns about Boeing's safety are an almost daily occurrence. *See* ECF No. 202 at 6-13.[30]

So now the parties come trotting back to this Court with promises in a plea agreement that—this time—they will get it right. But they offer no explanation for how the Department's previous and supposedly "vigilant and thorough" monitoring failed. The Court and the public can

[30] Another new serious report emerged just yesterday. *See* https://www.king5.com/article/news/investigations/investigators/newly-leaked-boeing-document-ethiopian-airlines-737-max-crash/281-7669b39b-6676-44be-a015-030f3e3cc877.

have little confidence in the Department's monitoring next time without understanding how and why it failed last time.

The plea agreement continues to place the monitoring of Boeing squarely in the Department's hands. Through an elaborate process, DOJ is going to select an "independent" monitor, with input from Boeing. *Id.* at ¶¶ 29-37. During that process, the monitor candidates will "meet with the Defendant and the [prosecutors]", followed by voting within the Criminal Division. *Id.* at 32. The votes will be made "in keeping with the Department's commitment to diversity and inclusion." *Id.* Remarkably, the process makes no provision for the families to have any input into the selection process.

Nor does the process involve this Court. The absence of any judicial role is a change from the plea deal the Government originally described to the Court (and to the families). In the Government's original notice of an agreement in principle, it said it would "notify the Court under seal of its intent to select a certain candidate; and *if*, after 10 days, *the Court does not raise concerns*, the Government will finalize the selection and appoint the monitor." ECF No. 206 at 6 (emphasis added). Now, in the proposed agreement, the parties have simply dropped that judicial-approval provision. *See* Proposed Plea Agreement ¶ 35.

The Court should reject a selection process that deprives it (and the families) of any role in the process. Indeed, some knowledgeable observers have concluded that judges should always select monitors. *See* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 284 (2014). But the Court need not go so far here. Instead, the Court should simply conclude that, given the Government's and Boeing's cozy relationship throughout this case—and serious suggestions that this case may involve "regulatory capture" by Boeing of federal

regulatory agencies[31]—the public cannot have confidence in a Government-selected monitor. The Court must be involved.[32]

But remarkably, not only is the Court excluded from the monitor selection process, but it also lacks any role whatsoever in the monitoring itself. And even if the Court had a role, perhaps even more remarkably, Boeing has *exempted itself from even having to follow the monitoring provisions*, as the defendant's "compliance obligations" are "not conditions of probation." The agreement provides:

> A condition of probation shall be that the Defendant retain an Independent Compliance Monitor, as provided in Paragraph 7(j). However, *the condition of probation is limited to the retention of the Independent Compliance Monitor—not* oversight of the Independent Compliance Monitor or *the Company's compliance with the Independent Compliance Monitor's recommendations*. Rather, the Independent Compliance Monitor will report to and be overseen by the Offices. The Independent Compliance Monitor's selection process, mandate, duties, review, and certification as described in Paragraphs 29-37 and Attachment D, and the Defendant's compliance obligations as described in Paragraphs 7(k), 8, and 9 and Attachment C, *are not conditions of probation*.

Proposed Plea Agreement ¶ 25(f) (emphases added); *see also* Att. D, ¶ 1 (similar language). While the families do not have comprehensive knowledge of all Justice Department monitoring agreements, the families do not believe that this curious provision is a standard one. In the three "standard" cases the Government cited to the court (ECF No. 221 at 1), one of the three involved a monitor—and no such provision is found in the monitoring provisions there. *See United States v. Telefonaktiebolaget LM Ericsson,* No. 1:19-cr-00884, Dkt. 33, Ex. A at ¶ 7(d) (S.D.N.Y. Mar. 20, 2023). And three other recent corporate plea agreements featured on the Fraud Section's

[31] *See, e.g.,* U.S. Sen. Commerce Comm., Committee Investigation Report: Aviation Safety Oversight (Dec. 2020), available at https://www.commerce.senate.gov/services/files/8F636324-2324-43B2-A178-F828B6E490E8.

[32] Of course, because some of the components of the selection process might be time-consuming, the Court could assign them to a Magistrate Judge or a Special Master as needed.

website contain plea agreements with a compliance monitor—and none contain the curious language that parties propose here. *See United States v. Binance Holdings Limited*, No. 2:23-cr-00178-RAJ, Dkt. 23 at ¶¶ 29-33 (W.D. Wash. Nov. 21, 2023); *United States v. Glencore Ltd.*, No. 3:22-cr-00071-SVN, Dkt. 18 at ¶¶ 25-28 (D. Conn. May 24, 2022) (Att. D); *United States v. Natwest Markets PLC*, No. 3:21-cr-187-OAW, Dkt. 9 at ¶¶ 23-27 (D. Conn. Dec. 21, 2021).

By statute and Guidelines, a court is permitted to impose conditions of probation on a corporation that pleads guilty to an offense. *See* 18 U.S.C. § 3563; *see also* U.S.S.G. § 8D1.1. In addition to standard conditions, the Court may impose any other conditions that the court believes "are reasonably related to the nature and circumstances of the offense or the history and characteristics of the organization…." U.S.S.G. §8D1.3(c). Against this backdrop, it is hard to understand why the parties are proposing in their plea agreement a non-standard provision setting out "compliance obligations" for Boeing and then specifically indicating that these purported "obligations" are "not conditions of probation." Are the "obligations" really "obligations"? This non-standard language seems rife with complicated interpretation issues.

As the families understand these provisions, if Boeing willfully decides to ignore the monitor's recommendations, nothing can be done about it. The "breach" provision in the plea agreement ties back into conditions that are "conditions of probation." Proposed Plea Agreement ¶ 38. Because Boeing's "compliance obligations" are *not* conditions of probation, the standard enforcement mechanisms for breach are unavailable.

The central point here is that "[a] corporate probation program necessitates court involvement and functions on behalf of the court." Veronica Root, "*The Monitor-'Client' Relationship*," 100 VA. L. REV. 523, 539 (2014). Yet the plea agreement curiously attempts to eliminate the Court's role regarding the monitor by placing all aspects of the monitorship within

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the Government's exclusive control. Not only is this dubious as a matter of separation of powers, but it is also unwise policy, given the Government's recent track record of failure in supervising Boeing. And, on top of that, the agreement's "compliance" obligations are rendered unenforceable. *Cf.* GARRETT, *supra*, at 284 ("A company should not be let off the hook until a judge has reviewed the monitor reports, heard from regulators and prosecutors, and decided it is in the public interest to conclude the case.").

Finally, even if the monitor was appropriately selected and provided enforceable compliance obligations, the parties have given the monitor such a narrow focus that the monitorship will not be able to achieve anything meaningful. The monitorship the parties propose is focused on anti-fraud issues and record-keeping. Thus, the proposed agreement sets out the monitor's "mandate" as evaluating "the effectiveness of the Company's compliance program and internal controls, record-keeping, policies, and procedures as they relate to the Company's current and ongoing compliance with U.S. fraud laws … with a focus on the integration of its compliance program with its safety and quality programs as necessary to detect and deter violations of anti-fraud laws or policies …." Proposed Plea Agreement, Att. D ¶ 3. The monitor should have a broader mandate, one that more squarely focuses on the safety issues that are of greatest concern to the public. The families have specifically proposed such a safety-oriented mandate for the monitor that they are currently proposing as a condition of supervised release for Boeing. *See* ECF No. 202-2 at ¶ 1(g)(1)-(15). The Court should reject the parties' proposed monitor because a mandate focused not on safety but on anti-fraud and record-keeping issues is too narrow.[33]

[33] There are other problems with the proposed monitor as well. For example, the monitor's mandate does not include "substantive review…of the correctness of any of the Company's decisions relating to compliance with the FAA's regulatory regime." Proposed Plea Agreement, Attachment D, ¶ 4 (emphasis added). That leaves some of the most critical aspects of Boeing's safety compliance outside the monitor's authority.

VII. The Court Should Reject the Plea Because the Provision Requiring Boeing to Make New Investments in Compliance, Quality, and Safety Programs Is Unenforceable and Inadequate.

As a term of its probation, Boeing has agreed to make an additional investment in its compliance, quality, and safety programs. While the additional-investment requirement is seemingly a step forward, on closer examination, the provision is essentially unenforceable and plainly inadequate to protect public safety.

In the proposed plea agreement, Boeing promises to make a new investment of $455,000,000 over the three-year term of probation into its programs for (1) compliance, (2) quality, and (3) safety. *See* Proposed Plea Agreement ¶ 25(g) ("the Defendant shall invest in its compliance, quality, and safety programs, a total of at least $455,000,000"). This translates into an approximate investment of $152 million per year for three years across three programs—i.e., Boeing's compliance program, quality program, and safety programs.

The parties tout this number as "an increase of approximately 75% above [Boeing's] previously planned expenditures on its *corporate compliance program* for fiscal year 2024" (Proposed Plea Agreement ¶ 25(g) (emphasis added)), suggesting that Boeing had planned an approximately $87 million expenditure for its "corporate compliance" program for the 2024 fiscal year. But, misleadingly, the parties provide no comparison for Boeing's planned expenditures for Boeing's quality or safety programs for any earlier years. A comparison of an investment across three programs to only one of those programs cannot be a fair representation of the size of the

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There are also various provisions allowing the monitor to provide only "executive summaries" of the monitor's reports on the public docket. *See, e.g., id.*, ¶ 14. But the ultimate issues regarding what should and should not be made public should rest in the hands of the Court, not the monitor.

Finally, the monitor is also given only a three-year term to complete the work involved. Proposed Plea Agreement ¶ 14. Given the complexity of the issues, a five-year term is more appropriate.

projected "increase" in investment. Moreover, any expenditures made by Boeing to implement internal support for the Independent Compliance Monitor are specifically identified as "qualifying investments" (*id.*), further artificially inflating the value of the proposed term of probation.

This provision will only have meaning if it is enforced. In a nod to this point, the plea agreement requires Boeing to "periodically, and no less than annually, provide proof of the accumulated investment amounts to the [Government] and the Probation Office." Proposed Plea Agreement ¶ 25(g). But how the prosecutors and the Court's probation office will have the required expertise to evaluate the complicated information Boeing provides is unclear. Curiously, in setting up the mandate for the one person who might have both the perceived independence and required expertise to make such evaluation—the independent compliance monitor—the parties have specifically excluded review of this information. *See* Proposed Plea Agreement, Att. D, ¶ 3 ("independent compliance monitor's mandate" limited to monitoring Paragraph 7(k) of the Agreement concerning anti-fraud programs).

Boeing and the Government have also declined to reveal to the Court any specifics about Boeing's historical expenditures for its compliance, quality, or safety programs. This absence of specific comparison data means it will not be possible to meaningfully evaluate whether Boeing is truly making new "investments" rather than recharacterizing expenditures it was already planning to make for other reasons.

As an example of this problem, on about May 30, 2024 (six weeks before agreeing to the plea deal here), Boeing representatives met with the FAA and presented what Boeing described as "sweeping changes to the company's production process and safety systems." Gregory Wallace, *Three-Hour Meeting Ends with FAA Saying Boeing Can't Increase Max Plane Production Until*

Quality is Fixed, CNN (May 30, 2024).[34] It appears that these previously promised "sweeping changes" count as "new" investments for purposes of the plea agreement. *See* Proposed Plea Agreement ¶ 25(g) (promising increased spending above that "previously planned" for "fiscal year 2024," which would mean spending above that previously planned as of the start of Boeing's fiscal year—i.e., as of January 1, 2024). This is deceptive sleight of hand, giving Boeing credit in the plea agreement for things it had already planned to do.[35] And, on top of all this, the public can have no confidence that Boeing is truly making any "investments" because Boeing's "proof" will apparently not be made available for public scrutiny.

Finally, an even more glaring problem with this provision is its utter inadequacy as a corrective measure. The "new" investment is a drop in a very large bucket.

In order to properly contextualize this term of probation, it is proper to examine Boeing's cost of sales in previous years, since cost of sales includes overhead costs, raw materials, parts, and labor. Essentially cost of sales represents the costs incurred as a result of revenue realized in a given year for goods and services. Boeing's annual reports (Form 10-K) show cost of sales in 2023 at $70,070,000,000, in 2022 at $63,078,000,000, and in 2021 at $59,237,000,000. Form 10-K, Boeing, Dec. 31, 2023 at 27.[36] These numbers yield an average annual cost of sales over that three-year period of approximately $64 billion. An increased investment of $152 million per year would

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[34] Available at https://www.cnn.com/2024/05/30/business/boeing-safety-plan-faa/index.html.

[35] The parties pulled off the same legerdemain in the DPA, giving Boeing "credit" for making payments through the DPA to its airline customers that Boeing was already contractually obligated to make. *See* ECF No. 65 at 8 ("The Government deceptively tried to take credit for these monies that not only were owed contractually, and independently of any investigation, but also had already been paid by the time the DPA was executed. The only reason for listing these amounts in the DPA was to mislead the public into believing the Government had obtained a $2.5 billion criminal settlement.").

[36] Available at https://s2.q4cdn.com/661678649/files/doc_financials/2023/q4/BOEING-10Q-Q42023-013124.pdf.

represent, on average, only an approximately 0.24% increase—a pittance.[37] Such a small amount cannot be expected to "afford adequate deterrence to criminal conduct" or to "protect the public from further crimes of the defendant." 18 U.S.C. § 3553(a)(2)(B) & (C).

VIII. The Court Should Reject the Plea Agreement Because the Restitution Provision is Misleading and Unfairly Allows Boeing to Tie Up Restitution Through Extensive Litigation and Appeals.

The parties also misleadingly try to give Boeing credit for having "agreed to pay lawful restitution owed" to the families. Proposed Plea Agreement ¶ 6(f). But Boeing has agreed to little more than to follow the law and pay whatever restitution the Court awards. *See* Proposed Plea Agreement ¶ 25(c) ("The Court will determine *whether* restitution is owed to *any* Crash Victim Family …. The Defendant retains the right t*o contest any restitution claim* and make any argument related thereto …." (emphases added)). In fact, Boeing appears to be setting up a legal position that it owes no restitution whatsoever. In agreeing to pay only "*lawful* restitution," Boeing is apparently maintaining its position that the families do not represent "victims" of Boeing's crime and, thus, that no restitution would be "lawful."[38]

The Court, of course, is familiar with the standard language in plea agreements presented to it by the U.S. Attorney's Office for the Northern District of Texas in which defendants affirmatively agree to pay restitution. For example, just a few months ago, the Court handled *United States v. Bender*, 4:24-cr-074-O (N.D. Tex.). The plea agreement there provided:

> The defendant agrees that the Court is authorized to order, and *the defendant agrees to pay, restitution* for all loss resulting from the offense(s) of conviction and all relevant conduct, in an amount to be determined by the Court.

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[37] As another point of comparison, in the years leading up to the two crashes, between March 2014 and September 2018, Boeing "bought back" approximately $38,000,000,000 worth of common stock.

[38] Boeing made exactly this argument last year to Fifth Circuit, claiming that the families did not represent crime "victims." *See* Boeing's Resp. to Mandamus Petition at 26, *In re Ryan*, No. 23-10168 (5th Cir. Mar. 27, 2023).

Bender, ECF No. 19 at ¶ 9 (emphasis added). This apparently standard provision[39] is what a defendant in this District agrees to when he or she is truly remorseful and wants to pay restitution. The seemingly unique language in the Boeing plea deal appears to be designed to let Boeing have it both ways: appear to agree to restitution but, in fact, agree to nothing.

But it gets worse. Typically in this District, prosecutors support recognized crime victims when they assert restitution claims. Indeed, such support is statutorily required by the CVRA. *See* 18 U.S.C. § 3771(a)(8) (extending to crime victims "[t]he right to fully and timely restitution as provided in law") and § 3771(c)(1) (requiring Justice Department employees to "make their best efforts to see that crime victims are … accorded the rights [in the CVRA]"). In this case, however, the families cannot even count on the normal, statutorily required support from the prosecutors. Instead, in a remarkable (and so far as undersigned counsel is aware, truly unique) provision, the prosecutors here merely "*retain the right to support any legally authorized claims for restitution presented by a Crash Victim Family.*" Proposed Plea Agreement ¶ 25(c). If the families understand this provision correctly, the Government "retains the right" to support legally authorized restitution claims—but then again, the Government presumably retains the right *not* to support such claims. How this discretionary approach squares with the law (or commonsense) is hard to understand.[40]

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[39] In many cases before this Court (e.g., immigration cases), no restitution is possible. In the cases where restitution is possible, something like the provision above seems to be standard. *See, e.g., United States v. Cisneros*, No. 4:24-cr-018-O, ECF No. 18 at ¶ 9 (N.D. Tex. Mar. 27, 2024) (substantially the same language as above); *United States v. Cota*, No. 4:24-cr-0005-Y, ECF No. 19 at ¶ 9 (same).

[40] The families fear that the Government and Boeing may possibly have reached a secret side deal, under which the Government does not plan to support restitution requests. During the June 30, 2024, information meeting, the Government told the families that the plea terms it was extending to Boeing included the Government's agreement to "stand silent" on restitution requests. Then, on July 9, 2024, during a call with the Government, the families' counsel asked whether the "stand silent" terms were still part of the deal. The Government declined to answer directly, referring counsel to the terms sheet filed with the Court—which, in turn, contained no information